ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF T-MOBILE USA, INC.

Cathleen A. Massey
Steve B. Sharkey
William J. Hackett
David M. Crawford
T-MOBILE USA, INC.
601 Pennsylvania Ave., NW
North Building, Suite 800
Washington, DC 20004
(202) 654-5900

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T-Mobile USA, Inc. ("T-Mobile")[1] respectfully submits these comments in response to the Wireless Telecommunications Bureau's *Notice*, which seeks input on ways to further expedite the deployment of next generation wireless infrastructure and give consumers access to superior wireless services nationwide.[2]

INTRODUCTION AND SUMMARY

T-Mobile applauds the Bureau's efforts to help expedite the deployment of new network infrastructure. Delivery on the promise of 5G will require the deployment of dense wireless networks and countless new small cells. But a web of legacy federal, state, and local siting requirements largely adopted in the context of macro cell deployment and different business models stands in the way. This proceeding affords the Commission the opportunity to facilitate

[1] T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

[2] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (WTB 2016) ("*Notice*"); *see also Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Order, DA 17-51 (Jan. 12, 2017) (extending comment and reply comment deadlines).

broadband deployment by taking additional steps to reduce time-consuming and unnecessary regulatory obstacles to infrastructure siting, including small cells.

T-Mobile, with its ubiquitous network upgrades and build plans designed to provide consumers the advanced wireless services essential to the economic health of our nation, is on the front lines of cell site development and modernization. T-Mobile's national wireless network contains approximately 66,000 cell sites, including macro sites and certain distributed antenna system ("DAS") network nodes,[3] and continues to expand to meet growing customer demand. Of these, 6,000 nodes/installations are located in public rights-of-way ("ROWs") in 24 different states today, and this number is expected to grow to 50,000 nationwide in five years. This underscores the importance of clear federal guidance regarding the deployment of new macro cell sites and small cells, as well as equipment upgrades at existing base stations.

Unfortunately, too often T-Mobile finds that unreasonable municipal requirements prevent or delay the deployment of collocations and the modernization of existing cell sites that are necessary to support broadband services. In T-Mobile's experience, many municipalities refuse to expedite the siting process, and some have established procedures to slow the process—or use the process to collect revenues that exceed costs—even in the face of Congressional mandates. San Francisco, for example, has adopted an ordinance that singles out wireless facilities in public ROWs for discretionary pre-deployment "aesthetic" review not imposed on

[3] *See* T-Mobile US, Inc., Annual Report (Form 10-K) at 7 (filed Feb. 14, 2017), http://investor.t-mobile.com/Doc/Index?did=39446392.

similarly-sized landline or utility facilities.[4] Litigation over the lawfulness of the ordinance is now entering its seventh year,[5] curtailing critical wireless buildout.

T-Mobile's experience is not isolated. Accordingly, while policymakers are to be commended for recent efforts to facilitate the deployment of advanced wireless infrastructure, a real and immediate need exists for the Commission to adopt "guardrails" that further and more effectively bound reasonable siting practices and fees. The Commission should:

- ***Limit application fees and ROW use charges, consistent with Sections 253 and 332 of the Communications Act (the "Act")***. The FCC should limit fees charged to process small cell and other wireless facility applications and to use public ROWs to actual processing and ROW management incremental costs. Those fees must be publicly disclosed and not discriminate among different classes of telecommunications providers. Any third-party consulting fees/expenses, licensing fees, or other charges designed to generate revenue rather than recover direct costs, also should be prohibited;

- ***Clarify when state/local requirements "prohibit or have the effect of prohibiting" service***. The FCC should clarify that a regulation prohibits/effectively prohibits service contrary to Section 253 if it either (1) "materially inhibits or limits" the ability of any competitor to compete, *or* (2) creates a "substantial barrier" to the provision of any telecommunication service. The FCC should also declare that carriers need not show an actual prohibition of service to trigger Section 253, and that all forms of moratoria (whether express or *de facto*) are prohibited. And the FCC should declare that the regulation of "need," technology, or other business issues violate Section 332;

- ***Further interpret "reasonable period of time" to act on wireless siting applications***. The FCC should accelerate the Section 332 shot clocks for all sites to (i) 60 days for collocations, including small cells, and (ii) 90 days for all other sites. The FCC also should interpret the shot clocks as including a "deemed granted" remedy for all applications covered by 332, including small cell and ROW applications;

[4] S.F. Ord. No. 12-11 (as amended by S.F. Ord. No. 18-15) requires compliance with aesthetics-based compatibility standards, determined solely by the location of the facility. The ordinance was initially adopted in January 2011.

[5] *See T-Mobile West LLC v. City and County of San Francisco*, 3 Cal. App. 5th 334 (Cal. App. 1st Dist. 2016), *review granted*, 385 P.3d 411 (Cal. 2016); *see also* Brief of Plaintiffs-Appellants, T-Mobile West LLC v. City and County of San Francisco, S238001 (Cal. filed Jan. 20, 2017).

- ***Clarify when state/local actions are not "competitively neutral and nondiscriminatory."*** The FCC should clarify that "competitively neutral" and "nondiscriminatory" ROW management means that providers of telecommunications services over wireless facilities in a ROW cannot be singled out for more onerous regulations that do not apply to telecommunications providers using other types of facilities in the ROW, like landline;

- ***Clarify that Sections 253 and 332 apply to requests to site facilities on municipal poles/ROWs***. The FCC should clarify that requests to access municipal poles and ROWs, and the terms and conditions of such access, implicate regulatory rather than proprietary functions—and therefore the protections of Section 253 (including the requirement that ROW and pole use charges be "fair and reasonable") and Section 332 (including the shot clocks) apply;

- ***Clarify mixed-use facilities are covered by Sections 253 and 332***. The FCC should make clear that Sections 253 and 332 apply to "mixed-use" facilities—*i.e.*, facilities used to provide wireless or any other telecommunications service and mobile broadband services—should mobile broadband services be classified once again as information services;

- ***Clarify Section 253 applies to all "telecommunications" services and "legal requirements."*** The FCC should exercise its authority under Section 253 to clarify that its statutory protections cover: all "telecommunications" services (including wireless) regardless of who owns the facilities, and all "legal requirements" (including contracts) that may effectively prohibit those services; and

- ***Eliminate or streamline unnecessary environmental and historic preservation reviews***. The FCC should (i) declare that small wireless facilities are not major federal actions or federal undertakings subject to federal environmental and historic preservation review; (ii) establish shot clocks to process environmental assessments ("EAs") and to resolve environmental delays and disputes; and (iii) eliminate the obligation to file an EA for sites located in a floodplain that will be built above the base flood elevation.

DISCUSSION

I. FCC ACTION IS CRITICAL TO ADDRESS DELAYS AND OTHERS BARRIERS TO WIRELESS DEPLOYMENTS, INCLUDING SMALL CELLS.

Demand for wireless services continues to explode, and to meet that demand providers like T-Mobile require ubiquitous infrastructure. That infrastructure includes traditional macro tower sites and collocations, but also increasingly small cells as carriers seek to densify their networks and use spectrum in higher bands that propagate over shorter distances. As the *Notice* recognizes, the wireless industry is "currently deploying and planning for additional construction

of a large number of small cells, and the number of these facilities is expected to grow rapidly over the next decade" as 5G deployments accelerate.[6] Indeed, an estimated 100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers will reach 455,000 by 2020 and 800,000 by 2026.[7]

Unfortunately, local siting and zoning barriers—including laws crafted to handle larger macro sites but not less impactful small cells—threaten to impede deployment of that infrastructure to the detriment of consumers, the nation, and our economy. As Chairman Pai has recognized, "[w]ithout a paradigm shift in our nation's approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back."[8] Commissioner O'Rielly has echoed this concern, explaining that "some localities, Tribal governments and states [are] seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule" necessary to deploy 5G.[9] And Commissioner Clyburn has noted that approving applications to site antennas and other infrastructure "are difficult policy challenges

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[6] *Notice*, 31 FCC Rcd at 13363.

[7] *Id.* at 13363-64.

[8] Ajit Pai, Comm'r, FCC, *A Digital Empowerment Agenda*, Cincinnati, Ohio, at 7 (Sept. 13, 2016).

[9] Michael O'Rielly, Comm'r, FCC, Statement Before the Senate Committee on Commerce, Science, and Transportation, *Oversight of the Federal Communications Commission*, at 2 (Sept. 15, 2016); *see also* Politico, *Future of the Wireless World: The Move to 5G* (Mar. 7, 2017), http://www.politico.com/events/2017/03/politicos-future-of-the-wireless-world-the-move-to-5g-235486?slide=2 (quote from Michael O'Rielly, Comm'r, FCC, beginning at the 52:53 mark) ("[W]e're having difficulty [with] some communities that are bad actors.... The problems range from a couple different things. One, the permitting process, the ability to get to 'yes' in some mechanism, and two is the cost.… Sometimes it's aesthetics.… But if the decision by a local community is just that 'No, we do not want change, but we want faster broadband,' something's got to give.… Preemption will be the mechanism to push localities to make the right decision.... I would like to see something done this year.").

for local governments," but those challenges must be overcome "to bring connectivity to those areas in need."[10]

While the FCC has taken a number of steps in recent years to accelerate the siting process—including adopting shot clocks and streamlining environmental reviews—and some states and localities have amended their siting processes to speed deployments, significant local zoning and permitting barriers remain. T-Mobile has encountered these and other challenges as it continues to upgrade existing facilities and deploy new ones, including small cells, across the county. These include:

Delays. It is not uncommon for it to take two years or more from small cell project initiation to completion. For example:

- *Many municipalities require carriers to sign a master license agreement ("MLA") for ROW access that can take six months to a year or more to approve*. These MLAs must be negotiated prior to submitting an application to install small cells in a municipal ROW, and often include a number of unfavorable provisions/conditions (*e.g.*, subject to termination if a higher priority user would benefit from the cessation of carrier use; and requiring the carrier to be responsible for all costs associated with inspections and approvals of construction work, with high costs for third-party consultants).

- *Approval of an application to install small cells on municipal poles can take 120 days or more*. In some cases, as many as six different departments (not including taxing districts) must approve the application prior to building permit submission, and it is not uncommon for departments to contradict each other.[11] Some localities also require public notice for each node, plus a full hearing if responses are received. It can take months to sort this process out: If the city has a working small cell review process in place, the application can be approved in a matter of weeks—but if the city uses a traditional macrocell approach or no process is in place, half a year or more is the norm. And there are several jurisdictions that have had moratoriums or effective moratoriums in place for the past two years.

[10] Mignon L. Clyburn, Comm'r, FCC, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown Univ. Law Center, at 3 (Oct. 19, 2016).

[11] For example, a locality's Traffic and Light Department may reject use of a traffic light and recommends a non-city-owned structure, but then the Zoning Department rejects a non-city-owned structure as against the local code.

Barriers. Local government actions may also hinder the introduction of new services, obstruct improvements to existing services, or deter prospective new entry. In T-Mobile's experience:

- *Many municipalities require the same zoning process for small cell applications as used for macro tower sites—or have no clear application process*. Often municipalities still review small cells the same way they review macrocells because they have either a telecommunications siting process designed for macrocells or no special process for telecommunications facilities—forcing applicants to contend with a long and costly process.[12] At least half of all jurisdictions fall into this category. Other municipalities (at least 15, in T-Mobile's experience) have no clear application process at all, and some (five jurisdictions and growing) refuse to process small cell requests under ROW permitting processes.

- *Most jurisdictions impose different processes for DAS/small cell deployments compared to other ROW occupants*. Eighty percent of jurisdictions in T-Mobile's experience treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities. For example, most require DAS and small cell deployments to undergo zoning review; many require aesthetic review; and some restrict wireless deployments to city-owned assets, have specific form factor guidelines, allow only a single company to attach to a particular pole or structure, and/or require unreasonable minimum distances between wireless facilities in ROWs.[13]

Excessive Fees. Some localities impose high initial fees and excessive recurring charges for the deployment of infrastructure on public ROWs. For example:

- *Localities are charging fees that exceed their actual incremental costs to manage the ROWs*. As Mobilitie has explained, many localities impose fees that recover what they believe is the "market rate" for the use of their ROW rather than simply the "fair and reasonable compensation" for their expenses.[14] These ROW use fees can run $1,500 per year.

- *Localities are using fees to generate revenue or fund third-party consultants*. Some localities view cell site deployment as a revenue stream, using fee-setting formulas of their own creation, which bear no relationship to their costs. For example, some local

[12] *Notice*, 31 FCC Rcd at 13366.

[13] *Id.* at 13367.

[14] *See* Mobilitie, LLC, Petition for Declaratory Ruling, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way, at 14-17 (Nov. 15, 2016) ("Mobilitie Petition"), *cited in Notice*, 31 FCC Rcd at 13366.

municipalities are demanding that T-Mobile obtain business licenses for cell sites, the cost of which bears no rational relationship to application processing or ROW management. Still others impose consultant fees and/or "franchise" their siting to third-party paid consultants, who act as gatekeepers.

Denials/effective denials. Unfounded denials or rejections—or municipal push-back that stops application processing—are further impediments to the successful deployment of wireless networks, including small cells. The most common bases for rejection or push back are aesthetics and claims of incompleteness, and a number of local governments prohibit or are moving to prohibit any wireless facility installations in residential areas. Local inaction is a related impediment—roughly thirty percent of all recently proposed T-Mobile sites (including small cells) involve cases where the locality simply fails to act, in violation of the shot clocks. It is unrealistic, though, to actually sue for every shot clock violation; this is why a deemed granted remedy, as proposed below, is so important.

II. THE FCC SHOULD EXERCISE ITS STATUTORY AUTHORITY TO FACILITATE AND SPEED WIRELESS FACILITY DEPLOYMENTS.

The Commission should act now to adopt "guardrails" that better define the scope and application of Sections 253 and 332. Specifically, the Commission should exercise its authority under Sections 253 and 332 to eliminate unreasonable application and ROW fees, further streamline wireless facility deployments, and improve access to the public poles and ROWs that are critical to next generation deployments, including small cells.[15]

[15] Sections 253 and 332(c)(7) of the Act were enacted to remove deployment barriers and speed the review and approval of siting applications by local land-use authorities. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 101, 704, 110 Stat. 56, 70, 151 (codified at 47 U.S.C. §§ 253, 332(c)(7)); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156, 232-33 ("Spectrum Act") (codified at 47 U.S.C. § 1455(a)). The Commission has used its authority under Section 332 to clarify the maximum presumptively reasonable time frames for review of siting applications and the criteria local governments may apply in deciding whether to approve them, and that authority has been upheld by courts. *Petition to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting*

Section 253 provides that while state or local governments may manage public ROWs and seek "fair and reasonable compensation" for their use, such management and compensation must be "competitively neutral and nondiscriminatory,"[16] and any required compensation must be "publicly disclosed."[17] In addition, both Sections 253 and 332 prohibit state and local government actions that "prohibit or have the effect of prohibiting" an entity's ability to provide any telecommunications or personal wireless service.[18] And Section 332 provides that state and local land-use authorities "shall act" act on wireless siting requests within a "reasonable period of time"[19] and may not "unreasonably discriminate among providers of functionally equivalent services."[20] By clarifying the scope and applicability of these two sections, and interpreting key terms, the Commission can make important strides to expedite the deployments needed to satisfy consumers growing demand for wireless.[21]

Review, Declaratory Ruling, 24 FCC Rcd 13994, 14020 ¶ 67 (2009) ("*Shot Clock Declaratory Ruling*"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12866-69 ¶¶ 2-8, 12878-81 ¶¶ 29-34 (2014) ("*Wireless Infrastructure Order*"), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[16] 47 U.S.C. § 253(c); *see also infra* note 84 (discussing FCC and appellate precedent confirming that these statutory requirements to apply to both compensation regulations *and* to the management of ROWs).

[17] 47 U.S.C. § 253(c).

[18] *Id*. §§ 253(a), 332(c)(7)(B)(i)(II).

[19] *Id*. § 332(c)(7)(B)(ii).

[20] *Id*. § 332(c)(7)(B)(i)(I).

[21] *See, e.g.*, CTIA, *Fostering 21st Century Wireless Connectivity: Key Spectrum & Infrastructure Issues for Policymakers*, at 8 (2017) ("CTIA White Paper") (calling on the FCC to "proactively address excessive and discriminatory right-of-way fees"), http://www.ctia.org/docs/default-source/default-document-library/ctia-white-paper-infrastructure.pdf.

A. The FCC Should Limit Application Fees and ROW Use Charges, Consistent with Sections 253 and 332.

The FCC should establish guideposts to ensure that both application processing fees and charges to manage public ROWs (including public poles located within those ROWs) are reasonably related to costs, by interpreting "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis" under Section 253(c), and using its authority under Section 253(a) and 332(c)(7) to ensure that state and local actions do not "prohibit or have the effect of prohibiting" service. Jurisdictions that do not comply should be presumed to be in violation of the statute, and the Commission should expressly indicate its belief that it would be appropriate for courts to treat such non-compliance as a significant factor weighing in favor of prompt injunctive relief to bring the offending fee or charge into compliance and/or to afford relief to an applicant that may have already paid the offending fee.[22]

Many localities request fees that unlawfully discriminate against wireless technology, resulting in the impairment of new or improved service.[23] Increasingly, these fees are used to generate revenue: In many cases, they are set to recover rates above fair and reasonable actual costs to process an application or, in the case of a public pole or ROW, to manage its use, and the fees can be recurring. These costs are directly impacting the evolution to 5G networks, which

[22] The FCC has stated that in the case of a failure to act within the Section 332 shot clocks, and absent some compelling need, "we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief." *Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284. The same rationale should apply to judicial review of unreasonable or discriminatory charges. In addition to judicial relief, applicants also can file a petition with the Commission seeking a declaration that a particular fee or charge violates the FCC's pronouncements and is preempted. *See* 47 U.S.C. § 253(d), 47 C.F.R. § 1.2. The Commission should, however, give these procedures some "teeth" by processing any such petition on an expedited basis designed to lead to a written decision within 60 days from filing.

[23] *See Notice*, 31 FCC Rcd at 13366-67; Mobilitie Petition at 14-16.

will "revolutionize the mobile wireless experience."[24] Localities should, therefore, be limited to direct cost recovery. As the Commission has repeatedly recognized, the "extraordinarily promising benefits" of 5G will require deployment of small cells—but municipalities charging more for them is a hindrance to the rapid move to 5G for the entire industry and country.

Application processing fees. The FCC should clarify that, with respect to application processing and related fees, a state or local authority shall only charge fees for the actual, direct, and reasonable costs incurred by the authority relating to the processing and granting of an application. Such fees shall be reasonably related in time to the incurring of such costs. Nor should fees include licensing or consultant fees, including: (i) travel expenses incurred by a third-party consultant in its review of an application; (ii) direct payment or reimbursement of third-party consultant rates; or (iii) fees charged on a contingency basis or a result-based arrangement.

These steps would align the Commission with the progressive steps already taken by some states. Missouri, for example, requires that fees imposed by a local authority—whether for or directly by a third-party providing review or technical consultation to the authority— must be based on "actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of an application."[25] In addition, Missouri also provides that "in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of an application," and "in no event shall an applicant be required to pay or reimburse an authority for consultation or other third-party fees based on a contingency or result-

[24] *Notice*, 31 FCC Rcd at 13362.

[25] Mo. Rev. Stat. § 67.5094(11).

based arrangement."[26] The Commission should act now to make such a cost-based approach the law of the land and remove once and for all unnecessary fee barriers to 5G deployments.

Importantly, the Commission also must act now to close potential backdoor approaches that could enable the assessment of fees that exceed actual costs and are unrelated to the application review process. In a few states, for example, local municipalities are demanding that T-Mobile obtain business licenses for individual cell sites before approving applications for new or modified sites.[27] Not only are cell sites not "businesses," but localities are also imposing unreasonable fee requirements on wireless providers to obtain these licenses and, in some circumstances, are refusing to issue cell site building permits for upgrades until the requirements are met. For example, a city in Missouri—notwithstanding the state laws just described— is demanding that carriers pay $6,000 per antenna in order to obtain a business license. Extrapolated nationally, this would cost T-Mobile *over $2 billion per year in just business license fees alone* if other jurisdictions followed suit.

Likewise, at least seven cities in California are requiring providers to pay a license fee based on a percentage of their revenue attributable to their local cell towers. As a practical matter, this type of fee is impossible to implement in any rational manner, because revenues are not calculated or collected based on cell site traffic. In addition, multiple cell sites can be involved in a single call or data transmission (*e.g.*, from a moving vehicle), and cell site usage is not limited to residents of the cities in which the towers are located, resulting in carriers paying multiple times on the same transmissions—particularly because different jurisdictions use

[26] *Id.*

[27] Some localities also hold fees in escrow pending completion of construction without any timeframe for return. T-Mobile, for example, has waited over a year-and-a-half, and in some instances longer, to recover unused monies in escrow.

different methods for calculating fees. More importantly, the fees are clearly unrelated to application review and are instead solely employed to generate revenues. The Commission must ensure that loopholes like these, that threaten to impair or derail 5G deployments, are closed.

ROW management charges. With respect to ROW charges, including charges to use public poles within the ROW, providers need relief from the onerous fees that today frustrate the deployment of more dense wireless networks that rely on small cells. Accordingly, the FCC should clarify that "fair and reasonable compensation" means charges that enable a locality to recoup the costs reasonably related to reviewing and issuing ROW permits, and any incremental ROW management costs associated with adding a new wireless facility and as applied equally to all ROW users. To single out wireless facilities and charge a higher rate for the use of the ROW must be presumed unreasonable and in violation of the statutory text. But where those costs are already recovered by existing fees, rates, or taxes paid by a wireless provider, no fee should be permitted to recover those same costs. As a consequence, additional charges or those not related to actual use of the ROW, such as fees based on carriers' revenues, must be declared *per se* unreasonable actions that "prohibit or have the effect of prohibiting" services.[28]

Such an approach is reasonable, as demonstrated by steps already taken at the federal level with respect to federal lands, and at the state level. In the 2012 Spectrum Act, for example,

[28] *See* 47 U.S.C. § 253(a), (c). While Congress preserved state and local tax laws in Section 601(c)(2) of the Telecommunications Act of 1996, § 601(c)(2), 110 Stat. at 143-44, the Commission should clarify that this does not preclude application of Section 253's "fair and reasonable" compensation limitations to fees for use of the ROW, even if those are characterized as "taxes." This is especially the case if what is really a fee, but is called a "tax," is imposed for ROW use on only a narrow class (such as wireless or small cell providers) rather than a broader class (such as all telecommunications carriers). *See Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931-32 (9th Cir. 1996). *But see MCI Commc'ns Servs. v. City of Eugene*, 359 Fed. Appx. 692, 695 (9th Cir. 2009) (indicating that an assessment based upon the gross revenue of telecommunications providers operating or using public rights-of-way within city limits is a tax that falls within the Section 601(c)(2) savings clause).

Congress established that the fee for the grant of an easement, ROW, or lease on federal buildings or lands must be "based on direct cost recovery."[29] Some states, too, have acted to require that ROW fees be capped or based on the actual costs of managing the ROW, recognizing that doing so would encourage faster deployment of wireless broadband in their communities.[30] Courts, however, have taken differing views,[31] making Commission action necessary to establish a uniform standard nationwide.

Relatedly, the Commission should specify that "competitively neutral and nondiscriminatory" means that rates imposed on one provider *(e.g.*, a wireless provider) may not exceed charges imposed on other providers (*e.g.*, a landline or cable operator) for similar access, without violating Section 253(c) and becoming an unlawful prohibition or effective prohibition under Section 253(a). And as required by the express language of Section 253(c), localities must "publicly disclose[]" to a provider seeking access to a ROW the charges they previously assessed on others for access—regardless of whether that prior access was for wireless or wired telecommunications.[32]

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[29] 47 U.S.C. § 1455(b)(3).

[30] *See, e.g.*, Wis. Stat. §§ 66.0404(4)(d)-(f); Iowa Code § 8C.3.9.

[31] *Compare City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 & n.19 (9th Cir. 2001) ("*Auburn*"), *cited in Notice*, 31 FCC Rcd at 13372 & n.72 (indicating that "non-cost-based fees" are "objectionable") *with TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000) (upholding a four-percent gross revenue fee); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 77-79 (2d Cir. 2002) ("*TCG N.Y.*") (declining to reach the issue).

[32] 47 U.S.C. § 253(c).

B. The Commission Should Clarify When State or Local Requirements "Prohibit or Have the Effect of Prohibiting" Service.

The Commission should clarify the meaning of the "prohibit or have the effect of prohibiting" language used in both Sections 253 and 332 of the Act. The Commission and the courts have provided different interpretations of this language over the years.

In the *California Payphone* case, for example, the Commission found that a regulation prohibits/effectively prohibits service under Section 253 if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[33] Some courts interpreting Section 253 have held that requirements have the effect of prohibiting telecommunications if they "create a substantial … barrier to entry into or participation in … telecommunications markets," such as through an "onerous application process" or requirements that afford the locality "unfettered discretion" over the provision of telecommunications.[34] Other courts, however, have held that a regulation violates Section 253 only if it actually prohibits service.[35]

Courts interpreting Section 332 have required applicants to establish that a denial "prohibits or has the effect of prohibiting" service by showing that they "need" the site, *i.e.*, by

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[33] *California Payphone Association Petition for Preemption*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997) ("*California Payphone*"), *cited in Notice*, 31 FCC Rcd at 13369 n.61.

[34] *See Auburn*, 260 F.3d at 1175-76; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269-70 (10th Cir. 2004) ("*Qwest*"); *see also TCG N.Y.*, 305 F.3d at 76-77; *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006). The Ninth Circuit subsequently departed from the broader *Auburn* standard in favor of the narrower "actual or effective prohibition" test espoused by the Eighth Circuit. *See infra* note 35 and accompanying text. As discussed below, the *Auburn* standard, in combination with the *California Payphone* interpretation, is the better approach and the one that should be adopted by the Commission.

[35] *Level 3 Commc'ns, LLC v. St. Louis*, 477 F.3d 528, 533-34 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. San Diego*, 543 F.3d 571, 576-79 (9th Cir. 2008).

showing a significant gap in service coverage and a lack of a feasible alternative location.[36] Courts also disagree about the showings needed to satisfy this standard, with some imposing a "heavy burden" to establish a lack of alternative feasible sites,[37] and others requiring an applicant to show that its proposed facilities are the "least intrusive means" for filling a coverage gap.[38] At least one circuit shifts the burden to the locality once the applicant makes a *prima facie* showing that its proposal is least intrusive.[39]

As the expert agency, the Commission should resolve these differences of interpretation and clarify both statutory provisions, as discussed below.[40]

As a threshold matter, however, the Commission should make clear that Section 253 applies more broadly than Section 332. While both sections address state and local actions that "prohibit or have the effect of prohibiting" certain services, Section 332(c)(7) is focused on "decisions regarding" and "regulation of" the placement of personal wireless facilities,"[41] whereas Section 253 covers not only "regulation" but also any "legal requirement" that creates

[36] *See Notice*, 31 FCC Rcd at 13369.

[37] *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *accord New Cingular Wireless PCS, LLC v. Fairfax County*, 674 F.3d 270, 277 (4th Cir. 2012); *T-Mobile Northeast LLC v. Fairfax County*, 672 F.3d 259, 266-68 (4th Cir. 2012) (en banc); *Helcher v. Dearborn County*, 595 F.3d 710, 723 (7th Cir. 2010).

[38] *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-99 (9th Cir. 2009).

[39] *American Tower Corp. v. City of San Diego*, 763 F.3d at 1056-57; T-*Mobile USA, Inc. v. City of Anacortes*, 572 F.3d at 995-99.

[40] *See Notice*, 31 FCC Rcd at 13370.

[41] 47 U.S.C. § 332(c)(7)(A), (B)(i).

barriers to the provision of any telecommunications service.[42] As a consequence, Section 253 covers contracts for access to and use of ROWs, not just siting decisions.[43]

1. The FCC Should Clarify that a Regulation Violates Section 253 If It Materially Inhibits or Is a Substantial Barrier to Telecommunications.

The Commission should clarify that a state or local rule, regulation, decision or impediment, including a failure to act, constitutes a prohibition or effective prohibition, contrary to Section 253, when it either: (1) "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,"[44] *or* (2) "create[s] a substantial … barrier to entry into or participation in" the provision of telecommunications, such as an "onerous application process" or unfettered discretion over those applications, among other things.[45] Once an applicant makes a *prima facie* showing that this standard has been violated, the burden should shift to the locality to rebut that showing. To further inform when local siting decisions violate this standard, the FCC should take the following actions.

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[42] *Id*. § 253(a).

[43] *See, e.g., Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21706-08 ¶¶ 16-19 (1999) ("The fact that Congress included the term 'other legal requirements' within the scope of section 253(a) recognizes that State and local barriers to entry could come from sources other than statutes and regulations. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services. We believe that interpreting the term 'legal requirement' broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition.").

[44] *California Payphone*, 12 FCC Rcd at 14206 ¶ 31, 14210 ¶ 42.

[45] *See Auburn*, 260 F.3d at 1175-76.

First, the Commission should clarify that the "prohibit or have the effect of prohibiting" language does not require the actual prohibition of service.[46] Some authorities require wireless providers to demonstrate an "actual prohibition" of service, but that term does not appear in Section 253. In fact, such a requirement is inconsistent with the statutory text that preempts not only requirements that "prohibit" communications services, but also those that "have the effect" of prohibiting those services. Indeed, requiring an "actual prohibition" risks setting the bar so high that the statutory protections would never be triggered, rendering them practically meaningless.[47]

Second, the Commission should declare that moratoria on the filing, receiving, processing, or approval of requests to construct or modify facilities to support wireless and other telecommunication services, including requests to site small cells on municipal poles or ROWs, are material inhibitors that "prohibit or have the effect of prohibiting" service contrary to Sections 253. In the *Wireless Infrastructure Order*, the FCC held that moratoria do not toll the running of the Section 332 shot clocks, but it declined to prohibit all moratoria and did not examine the legality of moratoria under Section 253.[48] The Commission should do so now.[49]

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[46] *See Qwest*, 380 F.3d at 1271 ("[A]n absolute bar on the provision of services is not required" to find prohibition of service and preemption of a local ordinance under 47 U.S.C.S. § 253. "It is enough that the ordinance would 'materially inhibit' the provision of services.").

[47] Courts have repeatedly rejected statutory interpretations that would render a statutory provision meaningless. *See, e.g.*, *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) ("Congress cannot be presumed to do a futile thing."); *RCA Global Commc'ns, Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985) (a proposed statutory construction that "would deprive" a statutory exemption "of all substantive effect" would produce "a result self evidently contrary to Congress' intent").

[48] *Wireless Infrastructure Order*, 29 FCC Rcd at 12971-72 ¶ 265.

[49] *See* CTIA White Paper at 8 ("[T]he FCC should prohibit moratoriums on new wireless deployments ….").

Addressing moratoria is increasingly important, because some states and localities do not know how to handle, or have procedures to address, requests to site facilities like small cells in ROWs or elsewhere. As a consequence, they adopt moratoria. Still others create *de facto* moratoria, by simply failing to act while they seek to develop policies and procedures, or by effectively barring the use of ROWs for wireless facilities by requiring all communications facilities to be located underground or banning wireless facilities in residential areas. But consumers should not have to wait for improved or next generation services. The FCC should make clear that localities must continue to address all wireless siting requests, including ROW applications, and that moratoria—whether express or *de facto*—are prohibited, even while localities work to develop broader siting policies. In this regard, the Commission also should make clear that this includes a prohibition against moratoria on issuing approvals for substantial modifications or installations that require a variance.

Third, the FCC should declare that state or local action or inaction that creates a substantial barrier to the provision of any telecommunications service— including new advanced wireless services like 5G, which will rely heavily on small cell ROW deployments—is an effective prohibition that violates Section 253. For example, the Commission should declare that an onerous application process that imposes burdensome requirements on applicants not related to management or use of the ROW is an effective prohibition.[50] Likewise, the Commission should declare that local procedures affording a locality unfettered discretion as to whether to grant or deny an application—including unnamed or undefined discretionary factors like

[50] *Cf. Auburn*, 260 F.3d at 1175-76.

aesthetics that do not pertain directly to the management or use of the ROW, or treating one type of telecommunications provider different than another—constitute an effective prohibition.[51]

2. The FCC Should Declare that the Regulation of Need, Technology, or Other Business Issues Violates Section 332.

The FCC should also make clear that the "prohibit or have the effect of prohibiting" language in Section 332 prohibits local regulations requiring a showing of "need" or other business imperatives—including an applicant's business decision on the type and location of wireless facilities, support structures, or poles, or decisions with respect to its technology deployed, coverage level, service, customer demand for service, or quality of service.

As noted, authorities interpreting Section 332 frequently require wireless providers to prove they need a particular site in a particular location, by showing a significant gap in service coverage and a lack of a feasible alternative, or that the proposed facilities are the least intrusive means for filling that gap. None of these terms appear in the statutory text, and as a practical matter they are simply ill-suited to modern deployments. In an era of near nationwide coverage, traditional "gaps" in service are becoming less prevalent, especially in urban areas; instead carriers increasingly rely on fill-in sites to expand capacity and support technology upgrades necessary to keep up with consumer demand. These decisions are made every day by network engineers, and their "need" for a site should be presumed, not second guessed, by localities that lack expertise in network design. While some states are to be commended for taking meaningful steps to eliminate obligations imposed on applicants to justify their proposals for locating

[51] *Cf. id*. at 1176-78; *Qwest*, 380 F.3d at 1269-70.

wireless equipment based on business needs,[52] FCC action is needed to bring uniformity nationwide.

In the event the FCC nonetheless determines that localities may consider coverage issues as part of their review under Section 332, the FCC should adopt guidelines regarding the appropriate scope of that consideration. First, it should reject the "lack of a feasible alternative" and the "least intrusive means" tests. In the context of small cells or use of the ROW, showing that one pole is the least intrusive means of filling a gap over another pole that is mere feet away, or a showing that the selected pole is the only feasible alternative, will be virtually impossible, rendering the standard meaningless. Either test would put applicants in the untenable position of enduring rejections of every other alternative site until only one viable site remains. Second, the FCC should clarify a gap in service is deemed to exist where a provider concludes that it does not have sufficient signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings. The assessment of sufficient signal strength or system capacity should be made by the provider based on its expertise, not the local jurisdiction.

Finally, the Commission should clarify that the "prohibit or have the effect of prohibiting" language prohibits state or local denials of a siting request that (i) are based on technical or operational justifications unrelated to health and safety,[53] or (ii) preclude an entity

[52] *See, e.g.*, Mo. Rev. Stat. § 67.5094(1) (an authority shall not evaluate applicant's "business decisions with respect to its designed service, customer demand for service, or quality of its service to or from a particular area or site"); 53 Pa. Cons. Stat. § 11702.3.3(a)(6) (a locality cannot require a collocation applicant "to justify the need for or the technical, business or service characteristics of the proposed wireless telecommunications facilities").

[53] While a local authority may consider height and collocation opportunities, as well as aesthetic and safety issues, it may not unreasonably discriminate between the applicant and other communications service providers. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I); *cf. Wireless*

from making technology or capacity enhancements—regardless of whether other providers or the carrier itself are already serving the area.[54] Declaring technical and operational considerations by jurisdictions to be violative of the "prohibit or have the effect of prohibiting" language in Section 332 will ensure consistency with case law decided under Section 332(c)(3) of the Act, which prohibits states from regulating the entry of mobile service providers.[55] For example, the Second Circuit has made clear that "Federal law has preempted the field of the technical and operational aspects of wireless telephone service, and there is 'no room' for … provisions … that give a preference to [particular technologies]."[56] Likewise, the Seventh Circuit has held that the FCC is "responsible for determining the number, placement and operation of the cellular towers and other infrastructure."[57]

C. The Commission Should Further Interpret What Is a "Reasonable Period of Time" to Act on Wireless Siting Applications.

The Commission should revisit its prior findings interpreting the requirement in Section 332(c)(7) that localities "shall act" on wireless siting applications within a "reasonable" period of time. In particular, the Commission should accelerate its shot clocks adopted in 2009, which

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Infrastructure Order, 29 FCC Rcd at 12944-45 ¶ 188 (recognizing that under a companion statute impacting wireless siting, Section 6409(a) of the Spectrum Act, "States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety"); Mo. Rev. Stat. § 67.5094(2)-(3) (an authority shall not "[d]ictate the type of wireless facilities, infrastructure or technology to be used by the applicant," but "may require an applicant to state … that it conducted an analysis of available collocation opportunities on existing wireless towers within the same search ring defined by the applicant, solely for the purpose of confirming that an applicant undertook such an analysis").

[54] *See also* CTIA White Paper at 8 ("[T]he FCC should prohibit … any … local practice that prevent[s] wireless technology upgrades.").

[55] 47 U.S.C. § 332(c)(3).

[56] *See N.Y. SMSA Ltd. P'ship. Town of Clarkstown*, 612 F.3d 97, 105-06 (2nd Cir. 2010).

[57] *Bastien v. AT&T Wireless Servs., Inc*., 205 F.3d 983, 989 (7th Cir. 2000).

have become increasingly outmoded in the small cell era, and at the same time add a deemed granted remedy that applies when a state or locality fails to act on a siting request within the applicable shot clock. Both recommendations are discussed further below.

Accelerated shot clocks. The Commission should accelerate the Section 332 shot clocks for all sites to (i) 60 days for collocations, including small cells, and (ii) 90 days for all other sites.

The Commission is to be applauded for its 2009 decision establishing shot clocks interpreting what is a "reasonable period of time" to act under Section 332(c)(7)(B)(ii)—90 days for state or local governments to process collocation applications and 150 days to process all other applications[58]—that ruling provided some crucial relief at a point in time when no timeframes applied to local review of siting applications. As the Commission itself has indicated, however, these timeframes are "longer than necessary and reasonable" to review not only small cell siting requests,[59] but also traditional collocations and new facilities. In addition, while Section 6409(a) and FCC rules require localities to act on requests to collocate certain facilities on a tower or structure with an existing approved antenna within 60 days or it will be deemed granted,[60] they do not apply to collocations on non-tower structures like buildings and poles that lack an existing antenna—many of which are ideal for 5G deployments. Instead, these collocations are processed under the 90-day shot clock.

The accelerated shot clocks proposed herein are necessary and appropriate. First, as the Commission is aware, some jurisdictions already take less time to review wireless siting

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[58] S*ee Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14012 ¶ 45.

[59] *See Notice*, 31 FCC Rcd at 13370.

[60] *See* Spectrum Act § 6409(a), 126 Stat. 156, 232-33; 47 C.F.R. § 1.40001(c)(2), (c)(4); *Wireless Infrastructure Order*, 29 FCC Rcd at 12875 ¶ 21.

applications than the current 90- and 150-day shot clocks prescribe: 14 days or less to complete the review of collocation applications, and 75 days or less to review new facilities or major modifications.[61]

Second, some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks. For example, collocation applications must be processed within 60 days in Minnesota,[62] within 45 business days in Florida,[63] and within 45 calendar days in New Hampshire and Wisconsin.[64] And in states like Virginia, legislation is advancing that would require small cell applications to be reviewed in 60 days.[65] Likewise, non-collocation applications must be reviewed within 90 days in Michigan, Virginia, and Wisconsin,[66] and non-collocation or new tower applications must be processed within 60 days in Minnesota and Kentucky.[67] While these states are to be commended for recognizing the importance of

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[61] S*ee Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14010-11 ¶ 43.

[62] Minn. Stat. § 15.99(2)(a). Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. *See id*.; *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14012 ¶ 47 (citing Minn. Stat. § 15.99); *see also* Mich. Comp. Laws Serv. § 125.3514(1)-(6) (subjecting certain collocations to a 60-day review period while exempting others from approval altogether).

[63] Fla. Stat. § 365.172(13)(d)(1).

[64] N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. § 66.0404(3)(c).

[65] *See* S.B. 1282, 2017 Sess. (Va. 2017) (passed Senate and House on Feb. 20, 2017; awaiting action by the Governor); *see also Virginia Advances Small-Cells Legislation as States Mull Local Limits*, Commc'ns Daily, at 6, Feb. 13, 2017 (noting that additional siting bills have been introduced in Arizona, Colorado, Michigan, Minnesota, New Jersey, Pennsylvania, and Washington).

[66] Mich. Comp. Laws Serv. § 125.3514(8); Va. Code Ann. § 15.2-2232(F); Wis. Stat. § 66.0404(2)(d). Virginia requires *any* application for a telecommunications facility to be processed in 90 days. *See* Va. Code Ann. § 15.2-2232(F).

[67] Minn. Stat. § 15.99(2)(a); Ky. Rev. Stat. Ann. § 100.987(4)(c).

removing siting barriers to speed advanced wireless and broadband services to their communities, these state-specific actions are not occurring uniformly throughout the nation. The hodge-podge nature of wireless siting regulations is a major barrier to future deployments, particularly 5G.

Third, since 2009 when the shot clocks were first adopted, localities have gained significant experience processing wireless siting applications. This experience, coupled with the increasing use of existing infrastructure to support smaller deployments—many of which require only minimal review and are already processed in 60 days or less—allow localities to speed processing times overall. For all these reasons, an accelerated 60-day shot clock for collocations (including small cells), and an accelerated 90-day shot clock for all other applications, are appropriate.

Deemed granted rule. The Commission also should interpret the Section 332 shot clocks as including a "deemed granted" remedy for all applications covered by 332, including small cell and ROW applications. Currently, the Section 332 shot clocks require applicants to pursue time-consuming and costly judicial review. This introduces substantial delay into the process, and often results in a ruling that sends the matter back to the locality—which can still then act to deny the application, dragging the process out for years.

For example, in *Crown Castle v. Greenburgh*, Crown requested authority to install a DAS system and sought processing within Section 332 shot clocks.[68] Yet it took the locality nearly three years to act—requiring multiple filings, town proceedings, and a public hearing—and even then it denied the applications. Only after Crown challenged the denial in court did a district

[68] *See Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699, *6-*8 (S.D.N.Y. 2013) ("*Greenburgh*"), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014).

court direct issuance of the permits,[69] which the Second Circuit later affirmed.[70] This case demonstrates that adding a deemed granted rule is therefore critical to incentivize states and localities to act within the shot clocks for all siting requests, regardless of whether they fall under Section 332 or Section 6409(a).

As Chairman Pai has stated:

> [T]he FCC has already established a shot clock within which local governments are supposed to review wireless infrastructure applications. But if a city doesn't process the application in that timeframe, a company's only remedy is to file a lawsuit. We should give our shot clock some teeth by adopting a "deemed-grant" remedy, so that a city's inaction lets that company proceed.[71]

Indeed, the fact that many states have incorporated a deemed granted remedy at the state level shows that such an approach is reasonable and not unduly burdensome.[72] The Commission should act now to make deemed granted relief available nationwide. And where an application has been deemed granted but the applicant still requires a permit (and one has not been issued), the Commission should indicate its belief that it would be appropriate for courts to treat such

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[69] *Id*. at *84-*87.

[70] 552 Fed. Appx. 47.

[71] Ajit Pai, Comm'r, FCC, Remarks at the CCA 2016 Annual Convention, Seattle, WA, at 2 (Sept. 21, 2016).

[72] *See, e.g*., Cal. Gov't Code § 65964.1 ("A collocation or siting application for a wireless telecommunications facility ... shall be deemed approved if ... the city or county fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC decisions."); N.H. Rev. Stat. Ann. § 12-K:10 ("[I]if the authority fails to act on a collocation application or modification application within the 45 calendar days review period, the collocation application or modification application shall be deemed approved."); Mich. Comp. Laws § 125.3514 ("[T]he body ... shall approve or deny the application not more than 60 days after the application is considered to be administratively complete. If the body ... fails to timely approve or deny the application, the application shall be considered approved ...."); Wis. Stat. § 66.0404(2)(d), (3)(c) (providing 90 days or deemed approved for new structures or 45 days or deemed approved for collocations).

non-compliance with the shot clock as a significant factor weighing in favor of prompt injunctive relief directing the locality to issue the permit.[73]

The Commission has the legal authority to adopt a deemed granted remedy. Although the Commission has previously declined to add a deemed granted remedy, circumstances have changed significantly since 2009 (when the FCC initially declined to adopt the remedy) and even since 2014 (when the FCC last examined the issue).[74] It is clear following the Supreme Court decision in *City of Arlington* that the FCC is authorized to adopt and interpret shot clocks to enforce Section 332(c)(7), even though the statute preserves local zoning authority.[75] And recent projections of up to 150,000 small cells by the end of 2018,[76] and nearly 800,000 by 2026,[77] demonstrate that case-by-case court review where localities fail to act is simply not a workable solution going forward.

Finally, the text of Section 332 obviates any suggestion that the judicial remedy therein is exclusive.[78] Section 332(c)(7)(B)(v) provides that a party aggrieved "may" commence an action in court, but it does not say that an applicant "must" do so.[79] To the contrary, the statute itself

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[73] *Cf. Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284 (stating that in the case of a failure to act within the Section 332 shot clocks, and absent some compelling need, "we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief"); *see also supra* note 22.

[74] *See Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009 ¶ 39; *Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284.

[75] *See* 133 S. Ct. at 1871, 1873-75.

[76] *Notice*, 31 FCC Rcd at 13363-64 (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

[77] *Id*. at 13364.

[78] *Cf. City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005).

[79] *See, e.g., Jones v. RCC Atl., Inc.*, 2009 U.S. Dist. LEXIS 1858, at *9 (D. Vt. 2009) ("[T]his Court finds Congress did not … intend that § 332 provide an exclusive remedy.")

does *not* preclude other forms of relief, and the Communications Act itself includes a savings clause providing that "[n]othing in this Act … shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[80] Indeed, the Commission has already adopted a "deemed granted" remedy in a similar case. Like Section 332, Section 621(a)(1) of the Act provides that an aggrieved applicant (there, an applicant for a competitive franchise) "may" appeal, [81] but the FCC still adopted a deemed granted remedy.[82] As the Commission there explained, "[i]n selecting this [deemed granted] remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines … while at the same time maintaining [local] authority to manage rights-of-way."[83] The same rationale applies here.

D. The Commission Should Clarify When State or Local Actions Are No Longer "Competitively Neutral" and Become "Discriminatory."

The Commission should clarify that state and local management of the use of ROWs is no longer "nondiscriminatory" or "competitively neutral" under Section 253(c),[84] and is an

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[80] 47 U.S.C. § 414.

[81] *Id*. § 541(a)(1).

[82] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 ¶ 4, 5127-28 ¶ 54, 5132 ¶ 62, 5134-37 ¶¶ 68-73, 5139 ¶¶ 77-78 (2007), *pet. for rev. denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); *see also* 22 FCC Rcd at 5140 ¶ 80 (noting that "the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker") (citing examples). Specifically, if a local cable franchising authority has not made a final decision on a franchise application within a specified period, the authority is deemed to have granted the applicant an interim franchise until it delivers a final decision.

[83] 22 FCC Rcd at 5138 ¶ 76.

[84] As a threshold matter, it is important to note that the Commission has already found, and the Third and Tenth Circuits have affirmed, that these statutory requirements to "apply to both compensation regulations *and to the management of rights-of-way*." *Qwest*, 380 F.3d at 1272 (emphasis added) (citing *Classic Telephone, Inc*., Memorandum Opinion and Order, 11 FCC Rcd

unlawful prohibition or effective prohibition of service under Section 253(a), when it disfavors one class of telecommunications provider in comparison to others. For example, a wireless ROW applicant must not be required to provide more information or go through an elongated process or technical review to obtain a permit than telecommunications providers that are not deploying wireless facilities. As noted, Section 253 applies to all "telecommunications services," not just "personal wireless" services.

The Commission also should provide additional clarification regarding the prohibition in Section 332(c)(7)(B)(i)(I) against "unreasonably discriminat[ing]" among providers of functionally equivalent services. In particular, the Commission should specify that localities cannot prefer one type of installation or one type of technology over another (*i.e.*, it is unreasonable to treat providers who are similarly situated in a disparate manner). In addition, the Commission should make clear that the prohibition requires all wireless facility requests, including small cell applications, to be processed on a nondiscriminatory basis. Finally, the Commission should specify that preferences of any kind for siting wireless facilities on municipal property are unreasonably discriminatory. As the Commission has recognized, providers have encountered situations where a municipal property preference coupled with onerous regulations make it difficult to site on non-municipal property.[85] The Commission should find that such preferences for placing wireless facilities on municipal property

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13082, 13103 (1996)); *see N.J. Payphone Ass'n v. Town of West New York*, 299 F.3d 235, 243-246 (3d Cir. 2002) ("[I]n looking at the statutory language in context, we find that the more logical reading of Section 253(c) requires management of public rights of way to be competitively neutral and nondiscriminatory."). *But see Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999) (suggesting a narrower interpretation).

[85] *See Wireless Infrastructure Order*, 29 FCC Rcd at 12976-77 ¶ 280.

unreasonably discriminate among providers by limiting the siting options of subsequent wireless entrants in a given area.

E. The Commission Should Clarify that Sections 253 and 332 Apply to Requests to Site Facilities on Municipal Poles and in Municipal ROWs.

The Commission should clarify that states and localities are not acting in their "proprietary capacity" when acting on requests to site facilities on, or setting access policies and rates for, municipal poles or ROWs—and therefore such requests are covered by both Sections 253 and 332. ROWs, including municipal poles and ROWs, are the ideal way to deploy the tens of thousands of new small cells that are needed to meet demand and serve customers.[86] By making clear that the statutory protections in Sections 253 and 332 apply to requests to site facilities on municipal poles and ROWs, the Commission can take a further step to help ensure these critical assets are available to support next generation services, including 5G.

This clarification is needed because some municipalities have argued that when it comes to granting access to and use of municipal ROWs (including municipal poles in those ROWs), they are acting in a proprietary capacity and therefore Section's 253's provisions governing "regulation" that impedes telecommunications do not apply.[87] Likewise, some localities have

[86] *See, e.g.*, Michael O'Rielly, Comm'r, FCC, Remarks at the Distributed Antenna Systems (DAS) and Small Cell Solutions Workshop (May 3, 2016) ("Site approvals in rights-of-way, which are especially important for small cell systems, appear to be particularly problematic."); Michael O'Rielly, Comm'r, FCC, Remarks Before Hogan Lovells' Technology Forum: "The 5G Triangle," at 2 (May 25, 2016) ("[A]n area that is ripe for attention is access to local rights of way…. Appropriate pressure will need to be applied to ensure that localities are not delaying access to rights of way—either intentionally or via sheer incompetence.").

[87] Essentially, these jurisdictions are trying to read proprietary loopholes into the statutory text. But their broad interpretation of what is proprietary inherently leaves open the ability to discriminate among providers by deciding what locations to lease and to whom, contrary to both the language and intent of Sections 253 and 332, and cannot be countenanced. This is particularly troublesome in the jurisdictions that impose municipal preferences for siting in their zoning codes.

construed Section 332 narrowly to apply only to local "zoning" decisions, claiming that action on requests to site wireless facilities on municipal-owned poles or ROWs is a proprietary function that does not implicate Section 332's protections regarding "regulation of the placement" of wireless facilities. These interpretations have no basis in the text of Sections 253 and 332 and undermine the goals of those provisions, and the Commission must clarify that they are incorrect.

While at least one court has held that Section 253(a) preempts only "regulatory scheme[s]"[88]—and the FCC cited this decision in 2014 when it held that Section 6409(a) does not apply where states or localities act in a proprietary capacity[89]—the FCC has yet to draw a line between proprietary and regulatory action.[90] The issue is thus ripe for resolution in this proceeding. Two cases that arose in the Section 332 context are instructive. In *Sprint Spectrum L.P. v. Mills*, the court found that Section 332(c)(7) did not apply to a request to install an antenna on a school roof, because the school was acting in a proprietary capacity.[91] Likewise in *Omnipoint v. Huntington*, the court held that authorizing an antenna in a city-owned park also was proprietary.[92] Access to municipal poles and ROWs is fundamentally different from access to a building or park, however, because municipal poles and ROWs are public property *intended to serve as the locations for public services*.

For example, in *NextG v. New York*, NextG demonstrated that light poles and public ROWs are "held by the City in trust for the public," and that requests to access those public

[88] *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004).

[89] *See Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65 ¶ 239.

[90] *Id*. at 12965 ¶ 240.

[91] *See Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 419-21 (2d Cir. 2002).

[92] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200-01 (9th Cir. 2013).

resources is something "substantially different from seeking to lease space in a City-owned building."[93] At issue in that case was whether a two-year delay and refusal by the city to grant access to poles in public ROWs absent a costly franchise violated Section 253, which like Section 332, bars state or local regulatory action which has the effect of prohibiting communications.[94] The court agreed with NextG that the city's actions "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy."[95] The Commission should adopt the same rationale here, and clarify that municipal ROWs and associated poles are public property intended to serve as the locations for public services.[96]

Specifically, the Commission should clarify that requests to access municipal poles and ROWs, and the terms and conditions of such access, implicate regulatory rather than proprietary functions and therefore the protections of Section 253 (including the requirement that ROW and

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[93] *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. 2004); *see also New Jersey Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001) ("[T]he control the municipality exerts over the easement is a function of its powers as trustee, conventionally expressed as the police power to manage the public right-of-way. *Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the streets and sidewalks*. Consequently, the Town's analogies and hypotheticals likening the effect of the Ordinance to the Town's management of public parks and buildings are inapt.") (emphasis added) (citations omitted).

[94] *Id*. at *16.

[95] *Id*. at *16-*18. The court ultimately found irreparable harm had not been established, and therefore declined to grant injunctive relief. *Id*. at *28-*30.

[96] *See also, e.g*., *City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) ("It is well established that municipalities hold public rights-of-way in a governmental capacity."); *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. S.Ct. 1993) ("Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public."); *Village of Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91, 95 n.18 (Mich. 1989) ("[T]he cities have no proprietary interest in city streets as their private property.") (internal quotation omitted); *City of Albany v. State*, 21 A.D.2d 224, 225 (N.Y. App. Div. 1964), *aff'd* 207 N.E.2d 864 (N.Y. 1965) ("We have no difficulty in finding that … the land held for street purposes … [was] held in a governmental rather than a proprietary capacity.") (citations omitted).

pole use charges be "fair and reasonable") and Section 332 (including the shot clocks implementing the "reasonable period of time" to act) apply. Indeed, Section 253(c)'s provisions requiring "fair and reasonable compensation" for use of ROW on a "nondiscriminatory basis" apply explicitly to state and local management of "the public rights-of-way," and make no mention of any proprietary carve-outs or exceptions.[97] Likewise, Section 332's obligation to act within a "reasonable period of time" applies to "*any* request for authorization" to place, construct or modify a wireless facility,[98] again without any indication of a carve-out or exception for a request to construct such a facility on a municipal pole or ROW. If Congress meant to exclude municipal-owned poles or ROW from the statutes, it would have done so explicitly.

F. The Commission Should Clarify that Mixed-Use Facilities are Covered by Sections 253 and 332.

The Commission should clarify that Sections 253 and 332 apply to "mixed-use" facilities—*i.e.*, facilities that are used to "provide personal wireless service or any other telecommunications service"[99] *and* mobile broadband services—should mobile broadband services be classified once again as information services. Although the FCC in its 2015 *Open Internet Order* reclassified broadband Internet access services, including mobile broadband, as telecommunications,[100] the *Open Internet Order* remains subject to petitions for rehearing

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[97] *See* 47 U.S.C. § 253(c).

[98] *See id*. § 332(c)(7)(B)(ii).

[99] *Notice*, 31 FCC Rcd at 13364. The term "personal wireless service" means, among other things, "commercial mobile service," 47 U.S.C. § 332(c)(7)(C)(i), and Congress has noted that the definition of 'telecommunications service' is intended to include commercial mobile service, H.R. Rep. No. 104-458, at 114 (1996) (Conf. Rep.).

[100] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5778 ¶ 388 (2015) ("*Open Internet Order*"), *aff'd sub nom., United States Telecomms. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets. for rehearing pending*.

pending before the U.S. Court of Appeals for the D.C. Circuit. The Commission should therefore act now to close the loophole that might open if mobile broadband is again classified as an information service.

As discussed above, Section 253 applies to the provision of "telecommunications service[s]," a term that does not include information services.[101] Likewise, Section 332(c)(7) applies to the provision of "personal wireless services," also known as "commercial mobile services,"[102] which—prior to 2015—also did not include information services like mobile broadband.[103] Accordingly, prior to the 2015 *Open Internet Order*, questions had arisen about the applicability of Section 332 to data services like mobile broadband. The FCC answered those questions in 2007: "We clarify that section 332(c)(7)(B) would continue to apply to wireless broadband Internet access service that is classified as an 'information service' where a wireless service provider uses the same infrastructure to provide its 'personal wireless services' and wireless broadband Internet access service."[104] The FCC should confirm that the same approach will apply to mixed use facilities should mobile broadband once again be treated as an information service.

For the same reasons, the Commission should clarify that mixed use facilities are covered by Section 253, and that its protections apply where a service provider uses the same facilities to

[101] *See* 47 U.S.C. § 153(24) ("The term 'information service' … does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.).

[102] *Id*. § 332(c)(7)(B), (C)(i).

[103] In 2007, the Commission classified wireless broadband Internet access service as an information service and also found that mobile wireless broadband Internet access service was not a commercial mobile service. *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5915-20 ¶¶ 37-52 (2007).

[104] *Id*. at 5293 ¶ 63.

provide telecommunications and information services.[105] Such a finding would be consistent with the FCC's 2007 finding that the pole attachment protections in Section 224 of the Act, which extend to providers of telecommunications, also apply to mixed-use facilities: "We clarify that where a wireless service provider uses the same pole attachments to provide both telecommunications and wireless broadband Internet access services, section 224 would apply."[106]

G. The Commission Should Clarify that Section 253 Applies to All "Telecommunications" Services and All "Legal Requirements."

The Commission should clarify that Section 253's protections extend to *all* telecommunications services, including wireless services. Clarification is needed because some localities have taken the position that challenges to local zoning authority regarding wireless facilities are governed exclusively by Section 332, and therefore Section 253 does not apply.

Courts have taken differing views. For example, the court in *Crown Castle NG East, Inc. v. Town of Greenburgh* found that challenges to local decisions involving the placement of wireless facilities lie only under 332(c)(7),[107] whereas the court in *Verizon Wireless (VAW) LLC v. City of Rio Rancho* rejected the argument that 332(c)(7) is the exclusive vehicle to challenge local zoning authority regarding wireless facilities, and held that such challenges may also be

[105] Of course, the Commission cannot apply Title II provisions to information services when those services are not offered alongside telecommunications services in a mixed-use context. *See, e.g.*, 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services ….").

[106] 22 FCC Rcd at 5922 ¶ 60.

[107] 2013 U.S. Dist. LEXIS 93699, *57-*66 (S.D.N.Y. July 3, 2013).

brought under 253.[108] The Commission should resolve the conflict by clarifying, consistent with its express language, that Section 253 applies to "any" telecommunications services,[109] including wireless. As the Supreme Court has recognized, "[a] provider of wireless telecommunications service is a provider of telecommunications service."[110]

The Commission also should clarify that Section 253 applies to all telecommunications services regardless of who owns the underlying facilities used to provide those services. In some cases, localities have argued that Section 253 does not apply if the facilities used to provide service are not owned by a telecommunications carrier. The Commission should make clear that ownership of the facilities is irrelevant—such a restriction does not appear in the statute. To the contrary, Section 253 is designed to remove barriers to entry that prohibit or effectively prohibit "any entity" from providing telecommunications service.[111] Thus, even if the facilities themselves are not owned by a telecommunications carrier, if a state or local law or legal requirement creates a barrier to entry that impedes "any entity['s]" ability to provide any telecommunications services over those facilities, Section 253 applies.

III. THE FCC SHOULD ELIMINATE OR STREAMLINE UNNECESSARY ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEWS.

The FCC should continue to eliminate and/or streamline unnecessary environmental reviews under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") to further speed the deployment of both small cells and traditional

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[108] 476 F. Supp. 2d 1325, 1333-39 (D.N.M. 2007); *see also Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886, 892 (S.D. Cal. 2005) ("[N]othing in section 332 precludes facial challenges of wireless regulations under section 253(a).") (citation omitted).

[109] 47 U.S.C. § 253(a).

[110] *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 340 (U.S. 2002) (internal quotations omitted).

[111] 47 U.S.C. § 253(a).

deployments. In particular, the Commission should (i) declare that small wireless facilities (as defined below) are not major federal actions or federal undertakings subject to federal environmental and historic preservation review; (ii) establish shot clocks to process EAs and to resolve environmental delays and disputes; and (iii) eliminate the obligation to file an EA for sites located in a floodplain that will be built above the base flood elevation.

No undertaking/major federal action. The Commission should revisit its 2014 decision finding that small cells are federal undertakings under NHPA (and, by analogy, major federal actions under NEPA).[112] Specifically, the Commission should determine that deployment of small cells[113] and associated support poles[114] (collectively "small wireless facilities") are neither a "major federal action" under NEPA nor a "federal undertaking" under the NHPA, and, as a result, such deployments would not be subject to environmental and historic preservation review. The Commission has ample authority to make such a finding.[115]

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[112] *See Wireless Infrastructure Order*, 29 FCC Rcd at 12904-05 ¶ 84. Courts have held that major federal actions under NEPA are closely analogous to federal undertakings under NHPA. *See Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001); *Karst Envt'l Educ. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007).

[113] For this purpose, small cell should be defined to mean any wireless antenna that meets the volumetric limits in Section VI.A.5 of the First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Aug. 3, 2016), 46 C.F.R. Pt. 1, App. B, or any such broader definition as the Commission may adopt.

[114] For this purpose, support poles would include new or modified poles that do not require FAA notification/FCC registration, or replacement poles of the same or similar height (*i.e.*, no more than 10% or twenty feet taller than the existing pole) that do not require FAA notification/FCC registration.

[115] *See Consideration of Biological Effects of Radiofrequency Radiation*, Report and Order, 100 F.C.C.2d 543, 546 ¶ 8 (1985) ("[T]he Commission is required to make a threshold determination as to whether the facilities it approves are 'major Federal actions significantly affecting the quality of the human environment,' thus triggering environmental review …."); Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process, § I.B (Sept. 2004), 47 C.F.R. Pt. 1, App. C ("The Commission has sole authority to

Under the FCC's blanket licensing scheme, wireless licensees and their designees are not required to obtain construction permits with respect to individual tower sites once a blanket license has been obtained to transmit specific frequencies in a given geographic area.[116] In fact, licensees may construct new wireless facilities, modify existing facilities, and remove wireless stations from service—all without even notifying the Commission. The Commission has acknowledged that it is not even aware of the location of most facilities constructed by wireless licensees.[117] Indeed, only certain towers or larger antennas require notice to the FAA and FCC registration for air safety purposes,[118] but small wireless facilities (as defined herein) do not meet the FAA notice/FCC registration criteria.[119] Thus, FCC involvement in the construction and modification of small wireless facilities is, at best, minimal, and does not constitute either a federal "undertaking" or a "major federal action." When the degree of agency involvement is marginal, NHPA and NEPA do not apply.[120]

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determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA.").

[116] *See* 47 U.S.C. § 319(d) (stating that construction permits are not necessary for "stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits"); *Wireless Infrastructure Order*, 29 FCC Rcd at 12904-05 ¶ 84 (explaining that "the Commission has generally waived the requirement of preconstruction approval for geographic area licensees, as permitted by Section 319(d)"); *see also, e.g.*, 47 C.F.R. § 24.11(b) ("Blanket licenses are granted for each market and frequency block. Applications for individual sites are not required and will not be accepted.").

[117] *See National Wireless Facilities Siting Policies*, Fact Sheet No. 2, at 28 (Sept. 17, 1996).

[118] *See* 47 C.F.R. §§ 17.4, 17.7.

[119] *See supra* notes 113-14 and accompanying text.

[120] *See Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244-45 (D.C. Cir. 1980) (for NEPA to apply, the federal government must undertake "some 'overt act' in furtherance of [a] party's project;" passivity or inaction are insufficient); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988) (where an agency's involvement is discretionary and limited to receipt of notice of the project, agency action "is only a marginal federal action rather than a major action"); *Lee v. Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1980) (where "the planning and construction of [a]

Environmental review shot clocks. The Commission should establish environmental review "shot clocks" for (i) the FCC processing of EAs for new and existing sites; (ii) resolution of sites referred to the Commission where the State Historic Preservation Office ("SHPO") has indicated it is foreclosed from reviewing the site; and (iii) resolution of environmental disputes.

EAs, when required under the FCC's rules, are currently not subject to any processing timelines or dispute resolutions procedures.[121] This can allow EAs for new facilities to languish for an extended period of time—sometimes years.[122] Licensees may also file EAs to "clean-up" existing sites (often acquired from third parties, where legacy environmental records may not exist), and these EAs too can remain pending indefinitely. In other cases, sites may be referred to the Commission where SHPOs indicate that they are "foreclosed" from commenting on whether the tower will affect historic properties. And even where EAs are not filed, parties may file environmental objections under the FCC's rules with respect to a planned facility,[123] in which case no timelines apply to resolve such disputes. The proposed shot clocks would address all of these situations.

Floodplain EAs. The FCC should eliminate the obligation to file an EA for sites that only trigger the floodplain factor, if the site will be built at least one foot above the base flood elevation and a local building permit has been obtained. Today, new facilities to be located in a

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facility is neither funded nor dependent on approval by a federal agency," the "provisions of NHPA … do not apply"). In *Sierra Club v. Penfold*, for example, the court held that mining operations that involved only minimal surface disturbance, and which required only notice but not approval of BLM, did not constitute a major federal action under NEPA. 857 F.2d at 1314. By contrast, small wireless facility deployments do not even require notice to the FCC, making the FCC's involvement even *less* than that deemed minor in *Sierra Club.*

[121] *See generally* 47 C.F.R. Pt. 1, Subpt. I.

[122] *See, e.g., SBA Towers III, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 1755 (WTB 2016) (more than a year-and-a-half to process an EA).

[123] *See, e.g.*, 47 C.F.R. § 1.1307(c).

floodplain still require an EA even where the facility will be constructed safely above the base flood elevation and has received a local building permit.[124] While this requirement has been unnecessary for years, it is about to become unworkable as providers increasingly deploy new poles to support the small cells critical to next generation services. As one provider cautioned in 2014:

> Practically speaking, much of the area along the Gulf Coast and other coastal regions fall within 100-year flood plains. In rural areas with little or no existing coverage, this may result in [the need for] hundreds of new utility poles, each with an individual environmental assessment for construction in the right-of-way.[125]

Elimination of the EA filing requirement in this circumstance would address this critical issue without endangering the environment. In order to ensure that facilities constructed in a floodplain will not significantly affect the environment, FCC practice is to require applicants constructing facilities in a floodplain to show that (1) the structure is at least 1 foot (0.3 meters) above the base flood elevation, and (2) construction will comply with local building requirements for constructions in floodplains, as evidenced by a building permit.[126] Floodplain EAs that include these requirements are routinely approved, and T-Mobile is not aware of any instance where an EA that only triggered the floodplain factor and met these requirements was denied.

There is thus no environmental benefit to requiring EAs under these circumstances, and instead they require applicants and Commission staff to spend needless amounts of time and

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[124] *See id*. § 1.1037(a)(6).

[125] *See* Comments of Crown Castle, WT Docket No. 13-238, at 3-4 (Feb. 3, 2014).

[126] *Final Programmatic Envtl. Assessment*, 2012 FCC LEXIS 1141, *182 (Mar. 13, 2012); *CAAM Partnership, LLC*, 26 FCC Rcd 3883, 3892 (MB 2011); *S-R Brod. Co*., 23 FCC Rcd 8574, 8583 (MB 2008); *American Tower Corp*., 21 FCC Rcd 1680, 1683-84 (WB 2006).

money preparing/reviewing such EAs—resources that will become increasingly strained with 5G deployments. The Commission should therefore eliminate the need to file EAs for sites located in a floodplain, if the site will be built at least one foot above the base flood elevation and a local build permit has been obtained.

CONCLUSION

For the reasons discussed above, the Commission should take the steps described herein, thereby facilitating the siting of wireless facilities and speeding the deployment of broadband where American consumers need it most.

Respectfully submitted,

T-MOBILE USA, INC.

By: /s/ Cathleen A. Massey
Cathleen A. Massey
Steve B. Sharkey
William J. Hackett
David M. Crawford

601 Pennsylvania Ave., NW
North Building, Suite 800
Washington, DC 20004
(202) 654-5900

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